United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,250

JAMES R. SCOTT,

Appellant,

v.

INDIANA R. SCOTT,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant Corporation
Counsel, D. C.

HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

COUNTER-STATEMENT OF QUESTIONS PRESENTED

As this Court has directed, the question presented is:

Whether a stay of commitment, following an adjudication of civil contempt, may be revoked summarily upon ex parte proof that the conditions of the stay have been violated?

Because of certain facts which have become apparent subsequent to the time this Court limited the appeal to the single question presented above, another questions is presented, namely:

Because appellant has wilfully and deliberately disobeyed the order of this Court that he resume making support payments "within a reasonable period" after his release from jail, should not his appeal be dismissed?

I N D E X

Page

SUBJECT INDEX

CASES CITED

UNITED STATES CODE CITED

OTHER AUTHORITIES CITED

* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,250

JAMES R. SCOTT,

Appellant,

v.

INDIANA R. SCOTT,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On June 23, 1961, appellee Indiana R. Scott, the wife of appellant James R. Scott, filed in the County Court of Allegheny County, Pennsylvania, a Reciprocal Enforcement of Support action. In her sworn petition and complaint, she alleged that she and appellant were married on December 28, 1939, in the Commonwealth of Virginia, and that, as a consequence of this marriage, two children were born. (R. 1-4.)

She further alleged that there came a time when appellant began drinking to excess, spent money on other women, and, in 1958, deserted his family. Appellee then moved with her two children to Pittsburgh, Pennsylvania, where she presently lives with her brother, his wife, and their three children. Appellee states that she is not receiving public assistance and earns approximately $34 weekly. (R. 1-4.)

On October 3, 1961, appellant, a District of Columbia resident, consented to an order of the District of Columbia Court of General Sessions, Domestic Relations Branch, by which he agreed to pay for the support of his wife and two minor children the sum of $20 weekly (R. 7). Appellant failed to comply with such order, and, on July 22, 1962, the court found that he was $220 in arrears. Appellant was thereupon adjudged to be in contempt of court and an order was entered committing him to jail for 20 days or until he purged himself of contempt. Execution of the order was, however, stayed upon condition that appellant "* * * shall not fail to make another $20 weekly payment as same comes due, and in addition thereto pay $5 weekly to apply on the $220 arrears until paid in full; said $25 weekly payments to commence July 28, 1962." (R. 9.)

Subsequently, on April 12, 1963, the court found that appellant was still $200 in arrears in his payments, and thereupon vacated and set aside the stay of execution and ordered him committed to jail for 20 days or until he paid $200 and costs (R. 9). The warrant of arrest was executed on September 17, 1963, and, on the same day, appellant purged himself of contempt by paying $200 plus $5 costs (R. 19).

On March 9, 1965, upon a finding that, as of February 6, 1965, appellant, although able to pay, was $2,400 in arrears, he was again adjudged to be in contempt of court and was ordered committed to jail for 180 days or until he purged himself by the payment of $2,4000 plus costs (R. 19). The court, however, as before, stayed the execution of the order of commitment on condition that appellant make future payments of $20 weekly and, in addition, pay $5 weekly on the arrears (R. 11-19).

Appellant again failed to comply with the trial court's order and, on January 7, 1966, after it was represented to the court that appellant was $2,270 in arrears, the court vacated and set aside the stay of execution entered March 9, 1965, and directed the United States marshal to execute the order of commitment (R. 11). The marshal's return of service indicates that the warrant was executed on January 28, 1966 (R. 12).

Appellant appealed to the District of Columbia Court of Appeals from the order of commitment (R. 14) and, thereafter, filed in that court a motion for "release on personal bond" pending the appeal, which motion was denied on February 14, 1966. Subsequently, appellant filed in this Court a similar motion for release on personal bond, and, on April 13, 1966, the Court, inter alia:

> "ORDERED * * * that appellant's * * * motion for release on [personal] bond be granted, and the order of the District of Columbia Court of General Sessions entered January 7, 1966, in Civil Action No. RS 398-61 is stayed pending further order of this court.
>
> "This stay is conditioned upon the resumption of support payments as ordered by the District of Columbia Court of General Sessions, within a reasonable period after appellant's release on bond."

On June 1, 1966, the District of Columbia Court of Appeals affirmed the order of the District of Columbia Court of General Sessions, Domestic Relations Branch. This Court, on June 16, 1966, vacated its order of April 13, 1966, set forth in part above, whereby appellant was released from commitment on his personal bond pending appeal. When, however, appellant petitioned this Court for allowance of an appeal from the judgment of the District of Columbia Court of Appeals, the Court, on June 29, 1966, reinstated its

order of April 13, 1966, which, for a second time, directed appellant's release on his personal bond "conditioned upon the resumption of support payments."[1]

This Court then appointed Charles H. Mayer, Esq., as amicus curiae and requested that he file a memorandum to aid it in determining whether or not to grant appellant's Petition for Allowance of an Appeal Fron the District of Columbia Court of Appeals. Amicus recommended that the petition be granted, and thereafter the Court allowed an appeal to consider the limited question: "whether a stay of execution of an order of adjudication in contempt and commitment may be summarily revoked?"

SUMMARY OF ARGUMENT

Appellant has wilfully and deliberately flouted both the orders of this Court and the trial court in refusing to support, although able to do so, his impecunious wife and two minor children. This appeal,

---

[1] As appears from the statement annexed to Appellee's Brief and certified by the Financial Clerk of the District of Columbia Court of General Sessions, Domestic Relations Branch, appellant has failed to comply with the conditions of his release imposed by the Court. He has made since his release a total of three payments, each in the amount of twenty-five dollars, on the following dates: June 14, 1966, June 28, 1966, and August 2, 1966.

therefore, should be dismissed. Dismissal of an appeal by a litigant who is in flagrant disobedience to the order of an appellate court is not a violation of due process; rather, it is a reasonable and proper method of "sustaining the effectiveness of the judicial process."

The stay of commitment granted appellant, conditioned as it was upon his making regular payments for the support of his family, including an amount toward the arrearage, was a matter of grace, not of right. Therefore, upon an ex parte showing of a breach of the condition, summary revocation of the stay was proper, and due process did not require a notice and hearing as a prerequisite.

ARGUMENT

I

The appeal should be dismissed because appellant has wilfully disobeyed the orders of this Court that he resume making support payments "within a reasonable period" after his release from jail.

Obviously, appellant believes that he can trifle with this Court. He has flagrantly disobeyed the Court's orders of April 13, 1966, and June 29, 1966, just as he twice before deliberately flouted the orders of the trial court.

Since this Court first ordered appellant's release from incarceration on April 13, 1966, " * * * conditioned upon * * * [his] resumption of support payments as ordered by the District of Columbia Court of General Sessions, within a reasonable period after * * * [his] release on [personal] bond," he has made only three payments of $25 each. His arrearage at the time of his incarceration for contempt was $2,270 (R. 11). As of March 14, 1967, this arrearage has increased substantially to $4,025.[2] The records of the Domestic Relations Branch will show that his last payment of $25 was made on August 2, 1966, more than seven months ago (Appendix to Appellee's Brief).

There can hardly be a doubt that appellant's contemptuous disregard of the order of this Court is wilful and deliberate. He has had the benefit of thoroughly experienced, retained counsel at every stage of the appellate proceedings, yet his record of payments is worse now than previously. Appellant has not, as he is required to do, sought a reduction of these current payments. Kephart v.

---

[2] As appellee has before represented to this Court, appellant, upon his release from jail on April 14, 1966, immediately resumed regular employment at a gross weekly salary of approximately $68. As of February 18, 1967, appellant was still regularly employed by the same employer.

Kephart, 89 U. S. App. D. C. 373, 193 F. 2d 677 (1951), cert. den. 342 U. S. 944 (1952). He has simply ceased making them.

Appellant, himself, admits that he has an income of "$65 a week" (Appellant's Brief in Support of Petition for Allowance of Appeal, p. 5), and twice the trial court found that he had the ability and means to comply with the order requiring payments of support. The only excuse which he tendered at any stage of these proceedings was that he was unable to fulfill his past obligation of support because of temporary unemployment. As to his present ability to support his dependents, he is silent.

"Appellate courts are virtually unanimous in holding that when their orders are disobeyed by an appellant dismissal of the appeal is warranted." Stewart v. Stewart, 91 Ariz. 356, 327 P. 2d 697, 699 (1962); see also the many cases collected in Anno., 49 A. L. R. 2d 1425, 1428 (1956). The Supreme Court has ruled that dismissal of the appeal of a litigant who is in disobedience to the orders of an appellate tribunal is not a violation of due process; rather, it is a "reasonable * * *" method of "sustaining the effectiveness of * * * [the] judicial process." National Union v. Arnold, 348 U. S. 37, 45 (1954). Such a dismissal may be ordered notwithstanding that commitment to jail will follow as a consequence.

Cf. Eisler v. United States, 338 U. S. 189 and 883 (1949); see also: National Union v. Arnold, supra, at p. 43.

Surely appellant is not entitled to the assistance of this Court when, by his adamant refusal to obey its orders, he has, in effect, forced the trial court to stipulate that he need not support his impecunious wife and minor children.[3]

II

A stay of commitment following an adjudication of contempt may be revoked summarily upon ex parte proof that the conditions of the stay have been violated.

Appellant advances a novel contention, hoping thereby to void the order of commitment. He contends that, before he can be jailed for civil contempt, he must be afforded two hearings.

That a hearing is required as a prerequisite to an adjudication of contempt is readily conceded. However, appellant argues that if,

---

[3] The trial court, on January 3, 1967, stayed any further action to enforce appellant's duty of support in this matter, pending the final disposition of this appeal.

While appellant is earning $68 a week, his wife is attempting to support herself and two minor children on an income half as great as appellant's, i.e., $34 a week (R. 2).

after being adjudicated in contempt, his commitment was stayed on conditions with which he does not or cannot comply, notice and a second hearing are required before he can be committed. Due process requires the second hearing, he urges, in order that he may have the opportunity to present his excuse for noncompliance with the conditions upon which the stay was predicated.

In similar cases courts have recognized the practical necessity of staying execution of orders of commitment, conditioned upon the resumption of regular payments for the support of dependents. Johnson v. Johnson, D. C. App., 195 A. 2d 406 (1963); Smith v. Smith, 222 Ga. 319, 149 S. E. 2d 683 (1966); Warner v. Superior Court, 126 Cal. App. 2d 821, 273 P. 2d 89 (1954); Volastro v. Volastro, 35 Misc. 2d 52, 230 N. Y. S. 2d 403 (1962); Vastola v. Vastola, 23 Misc. 2d 39, 200 N. Y. S. 2d 512 (1960); Dobies v. Dobies, 278 App. Div. 961, 105 N. Y. S. 2d 524 (1951). The court's action in such cases is not so much out of compassion for the runaway father, rather, for the benefit of the deserted, and usually destitute, family. Truslow v. Truslow, D. C. App., 212 A. 2d 763 (1965).

Upon the contemner's failure to abide by the conditions of the stay, the court has no alternative except to set it aside, and the court

may do this at an ex parte hearing without further notice to the contemner. The rationale of this practice was set forth in the opinion of the District of Columbia Court of Appeals:

> "When the order of support was entered, appellant was bound to obey it until it was modified by the court. Kephart v. Kephart, 89 U. S. App. D. C. 373, 377, 193 F. 2d 677, 680 (1951), cert. denied, 342 U. S. 944, 72 S. Ct. 577, 96 L. Ed. 702. If appellant felt that because of physical disability, or for any other reason, he was not able to comply with the order, he should have applied to the court for a modification of the order. Kephart v. Kephart, supra. This he did not do. When appellant defaulted in making payments, the court appropriately ordered his commitment. * * * "
> Scott v. Scott, 220 A. 2d 95, 96.

Such a practice has been commonly followed by courts in other jurisdictions and, apparently, has been approved "without comment by the appellate courts." 24 AM. JUR. 2d, DIVORCE AND SEPARATION, § 768. See, for instance, the following cases in which the practice has been approved without comment. Schwarzbart v. Schwarzbart, 19 App. Div. 2d 756, 243 N. Y. S. 2d 76 (1963); Caputo v. Caputo, ____ Misc. 2d ____, 211 N. Y. S. 2d 255 (1961); Kerkos v. Kerkos, 16 N. J. Super. 101, 84 A. 2d 24 (1951); Norvell v. Norvell, 192 Ga. 1, 14 S. E. 2d 440 (1941). Neither

appellant nor amicus curiae has cited any cases which hold to the contrary.

There is nothing fundamentally unfair about the procedure here utilized by the trial court. Appellant knew of his default because it was his own act. He knew of the consequences of his default because, on a previous occasion, he had been incarcerated for failure to abide by the conditions of an earlier stay (R. 19). Further, as the amicus detailed in his brief, following an adjudication of contempt and the granting of a stay of commitment, all contemners are carefully apprised of the procedure. Amicus states:

> "* * * When the defendant [contemner] is present in court and a stay of execution is entered, it is the invariable practice of the present sitting judges to explain carefully to him what is being done; that is, the judge carefully points out that he has been held in contempt and has been given a jail sentence; that the jail sentence is being suspended in order to give him an opportunity to purge himself of the arrears by making moderate additional payments; but that if he fails to comply with this condition the jail sentence, in all probability, will be invoked." (Amicus Brief, pp. 4-5.)

If, as appellant contended in the District of Columbia Court of Appeals, he was unable, because of physical disability, to comply with the conditions of the stay, his course was clear: "he should

have applied to the court for a modification of the order." Scott v. Scott, supra, at p. 96; Kephart v. Kephart, supra; Mowbray v. Mowbray, 20 Misc. 2d 533, 190 N. Y. S. 2d 783 (1959). Absent such a request for modification, the stay of commitment, upon ex parte application and proof, was properly set aside.

The stay of commitment entered by the trial court was a matter of grace. Appellant's grant of conditional freedom from immediate incarceration was, in effect, based upon a contract between the granting authority and appellant. He could have rejected the undertaking but, having accepted it, he was bound to fulfill its conditions either by paying regularly the amount ordered for support or, alternatively, if he became financially unable to do so, by obtaining from the court a modification of the support order.

Notwithstanding that, under such circumstances, there is no due process requirement for a second hearing, there is a practical reason for not providing one. The purpose of this type of proceeding is to compel the runaway father to abide by his moral and legal obligation to support his family. Edmonds v. Edmonds, D. C. Mun. App., 146 A. 2d 774 (1958). If he were invited to show cause why the stay of commitment should not be immediately revoked, it seems reasonable to surmise that he, having already been dubbed a "run-

away," would avoid the probability of immediate incarceration by again running away. He would, in all likelihood, flee as far from this jurisdiction as he could go. Such a consequence is not mere conjecture. Cf. Commonwealth v. Hall, 277 Ky. 612, 126 S. W. 2d 1056 (1939).

Although the proceeding here is one for civil contempt, a somewhat analogous situation exists in criminal proceedings where there is an ex parte revocation or suspension of sentence, parole, conditional pardon, or probation. Absent statutory command, constitutional due process does not require a hearing as a condition of revocation of one of the above methods of prisoner release. Escoe v. Zerbst, 295 U. S. 490 (1935); Burns v. United States, 287 U. S. 216 (1932); United States v. Freeman, 160 F. Supp. 532 (D. D. C., 1957), aff'd. 103 U. S. App. D. C. 15, 254 F. 2d 352 (1958); Jones v. Rivers, 338 F. 2d 862 (4th Cir., 1964).

Speaking for the Court in Escoe v. Zerbst, supra, Justice Cardoza expressly rejected the contention that a hearing must be held as a prerequisite to a revocation of probation, reasoning that probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions as may be authorized, including the dispensing with notice and hearing.

Of course, this is not to suggest that no hearing is required where there is a statutory directive that notice and a hearing be given. Ibid. and cf. 18 U. S. C. § 4207 (1964). But, where there is no such statutory requirement, due process is not offended by an ex parte proceeding which may result in the probationer's re-incarceration.

If due process does not require notice and hearing there, it reasonably follows that none is required in the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed or, alternatively, that the judgment of the District of Columbia Court of Appeals be affirmed.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant Corporation
Counsel, D. C.

HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS
Fourth and E Streets, N.W.

Joseph M. Burton
Clerk

DOMESTIC RELATIONS BRANCH

John M. Bischoff
Chief Deputy Clerk

Leroy H. McCarthy
Assistant Chief Deputy Clerk

Reply to:
Mr. John R. Klein
Supervisor, Reciprocal Support Section

Washington, D.C. 20001
Telephone REpublic 7-4575

March 14, 1967

RE: Indiana Scott

vs

James R. Scott
Civil Action No.
RS 398-61 R

TO WHOM IT MAY CONCERN:

This is to certify that the above defendant, James R. Scott, has paid thru this office the sum of $1655.00. The total amount that should had been paid thru this office is $5680.00. This leaves a arrears of $4025.00 as of March 11, 1967.

Since April 13, 1966, a total of three payments have been made. They are as follow:

June 14, 1966 $25.00
June 28, 1966 $25.00
August 2, 1966 $25.00

I hope that this information will be of assistance to you.

Sincerely yours,

Early F. Darnell

Early F. Darnell
Financial Clerk

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,250

JAMES R. SCOTT,

Appellant,

v.

INDIANA R. SCOTT,

Appellee.

OPPOSITION TO PETITION FOR REHEARING EN BANC

The points relied upon by appellant in support of his petition for rehearing en banc were extensively briefed, strenuously urged during oral argument, and fully and correctly disposed of by this Court in its opinion rendered in the above-entitled cause on July 27, 1967.

No point or matter is now urged by appellant as ground for a rehearing which was not submitted to this Court during the original presentation of the case.

There has been no intervening decision by this Court or by the Supreme Court of the United States which established legal principles inconsistent with those declared by this Court in its decision.

For the foregoing reasons, it is respectfully submitted that the petition for rehearing en banc should be denied.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was mailed, postage prepaid, this 7th day of September 1967, to James J. Laughlin, Esq., National Press Building, Washington, D. C., Attorney for Appellant.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.